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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-193

JOSEPH JEFFERSON, JR., Petitioner

V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

John M. Levy
The Insurance Building
10 South 10th Street,
Richmond, Virginia 23219

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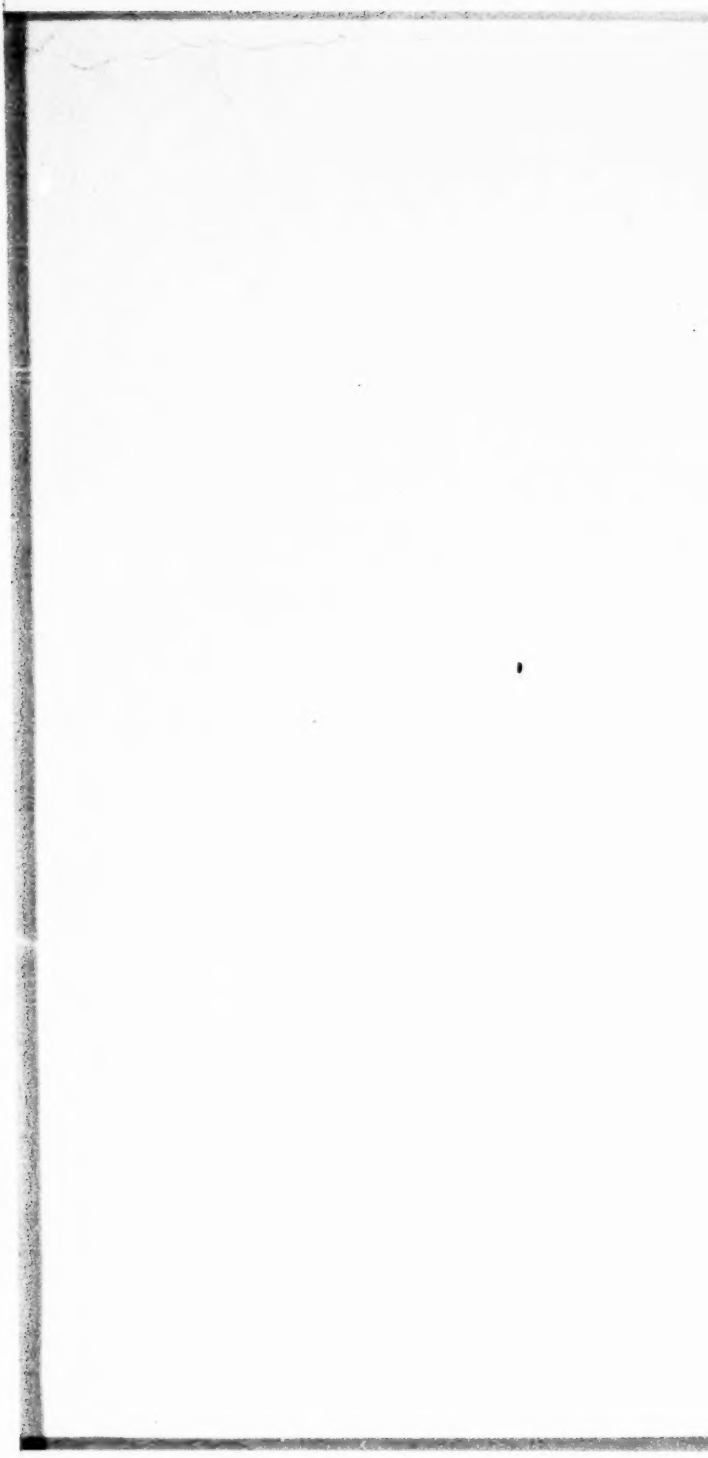

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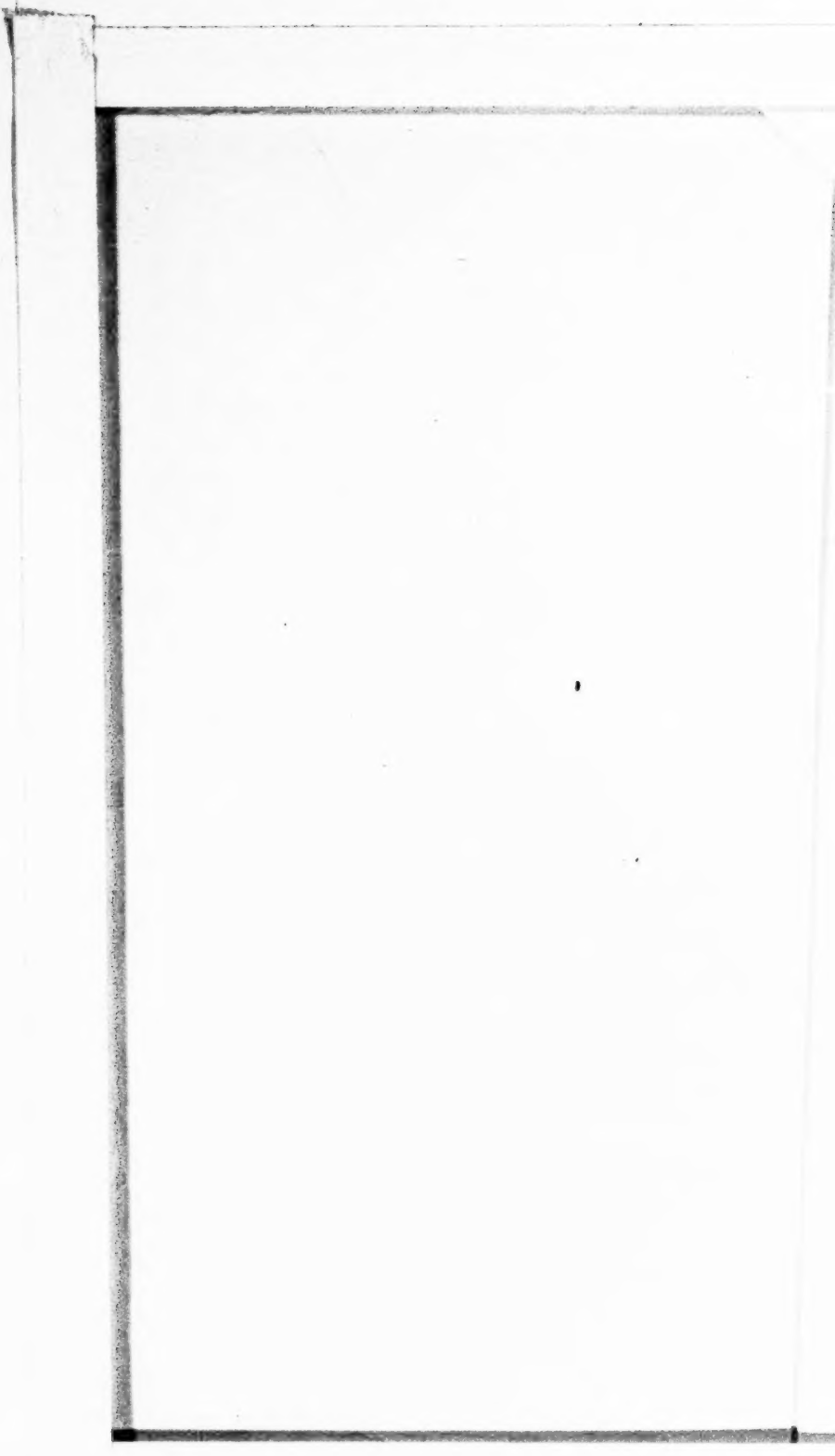

IN THE

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JOSEPH JEFFERSON, JR., Petitioner

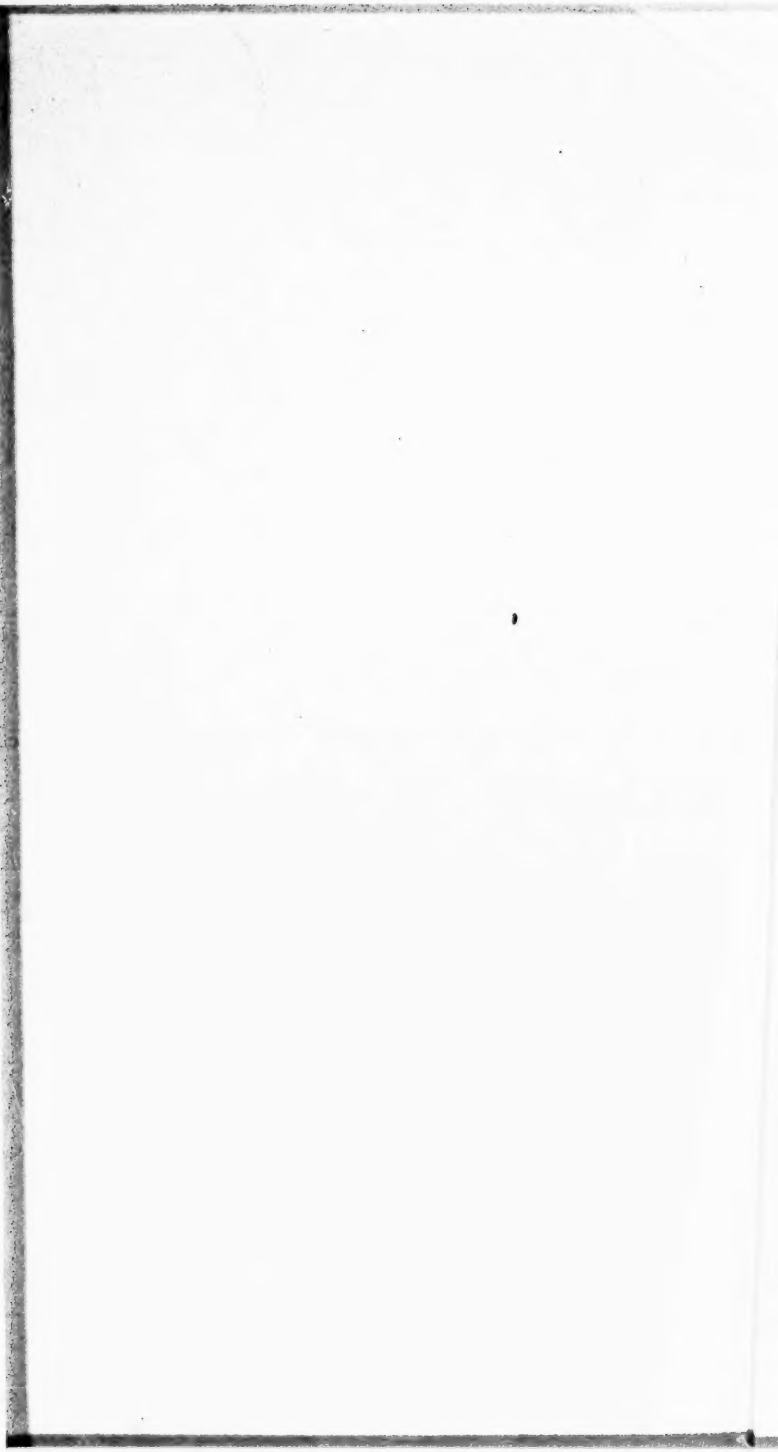
V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associated Justices of the Supreme Court of the United States:

Petitoner, Joseph Jefferson, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on June 27, 1973.



OPINIONS BELOW

Fourth Circuit. The opinion of the court below in this case has not yet been reported. It is included in the Appendix, infra.

District Court. No opinion was rendered by the District Court, Eastern District of Virginia, Richmond Division. Its judgment and commitment order is likewise set forth in the Appendix, infra.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was entered on June 27, 1973. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Notwithstanding the "plain view" doctrine enunciated in Chimel v. California, 395 U.S. 752, the "automobile exception" to the warrant requirement enunciated in Carroll v. United States, 267 U.S. 132, and Chambers v. Maroney, 392 U.S. 42, and the "exigent

circumstances" test laid down in Coolidge v. New Hampshire, 403 U.S. 443, whether a valid warrantless seizure may be made by an arresting officer whose probable cause was based on information supplied by a police officer from another jurisdiction, whose information was in turn based on that of an informant who was not personally known to the arresting officer.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searchs, and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the night of August 14, 1972, police officer Aubrey S. Powell of the Henrico County police department received

at approximately 11:00 o'clock p.m. certain information from an informant known to him to be reliable. The information was that the petitioner had in his possession a firearm, thought to be a .44 magnum, which he would be carrying on his person in a shoulder holster. (Tr-13,14). This information was then relayed by Officer Powell to Detective J. D. Millikin of the Richmond Bureau of Police, who received the information a little after midnight, on the morning of August 15, 1972. (Tr-11).

Three hours later, at approximately 3:00 o'clock a.m., Detective Millikin, accompanied by Officer Powell, arrested petitioner in the City of Richmond in his vehicle by turning on his siren and red lights. (Officer Powell had no police authority in the City of Richmond.) Upon approaching petitioner's vehicle, Detective Millikin testified that he observed petitioner remove a pistol from his waistline and place it into the ash tray. (Tr-6). Detective Millikin then placed petitioner under arrest on a charge of unlawfully carrying a concealed weapon. This charge was subsequently dismissed in the Police Court of the City of Richmond, which has original jurisdiction over this offense.

However, the petitioner was later indicted by a federal grand jury for having violated Title 18, U.S.C., Appendix § 1202(a) on August 15, 1972 because he had been previously convicted by a court for a crime punishable by imprisonment for a term of more than one year and was found to have received and possessed a firearm which had traveled in interstate commerce. During the course of petitioner's trial in the District Court, petitioner's counsel sought to suppress certain evidence, i.e., a .32 calibre pistol found by Detective Millikin in the ash tray of petitioner's automobile. The basis of the motion to suppress was that Detective Millikin did not have sufficient probable cause to execute a warrantless arrest, consequently invalidating the seizure of the weapon. This motion was denied (Tr-40), and defendant convicted. Petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment of the District Court in an opinion entered June 27, 1973 (see Appendix, infra) citing various authorities to which your petitioner respectfully objects as being inapplicable to his case.

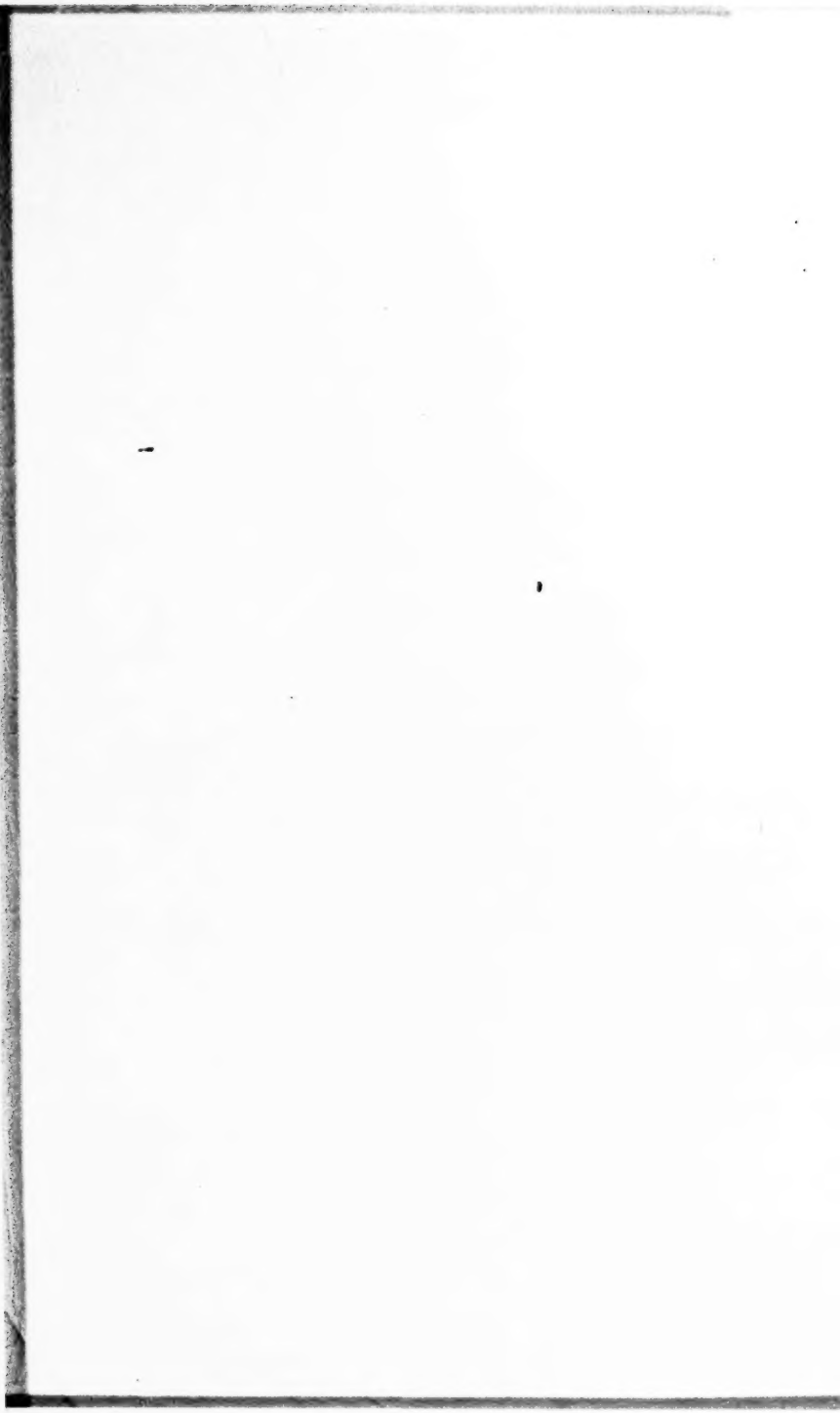
REASONS FOR GRANTING THE WRIT

THERE WAS NO SUFFICIENT PROBABLE CAUSE FOR PETITIONER'S ARREST.

As appears from the statement of the case (supra) an exceptionally strong showing was made that petitioner's arrest was tainted by the fact that the arresting officer did not have sufficient probable cause to make the arrest, i.e., stopping defendant's car by the use of a siren and red lights because the reliability of the informant was not personally known to the arresting officer. However, when petitioner sought to exclude the evidence gained as a result of his arrest, his motion was denied by both the District Court and the Court of Appeals. Petitioner submits that the arresting officer did not have probable cause to stop him, which was, in fact, an act of arrest because he relied on uncorroborated information received from one person, who in turn received his information from another person and whose reliability was not personally known to the arresting officer.

The gravamen of petitioner's contention can best be seen through the rule of law set down by this Court in Aguilar v. State of Texas, 378 U.S. 108, 84 S.Ct. 1509, 1512, 12 L.Ed. 2d 723 (1964); which requires a police officer seeking a search warrant or making an arrest based upon information from an informant to establish the reliability of his informant.

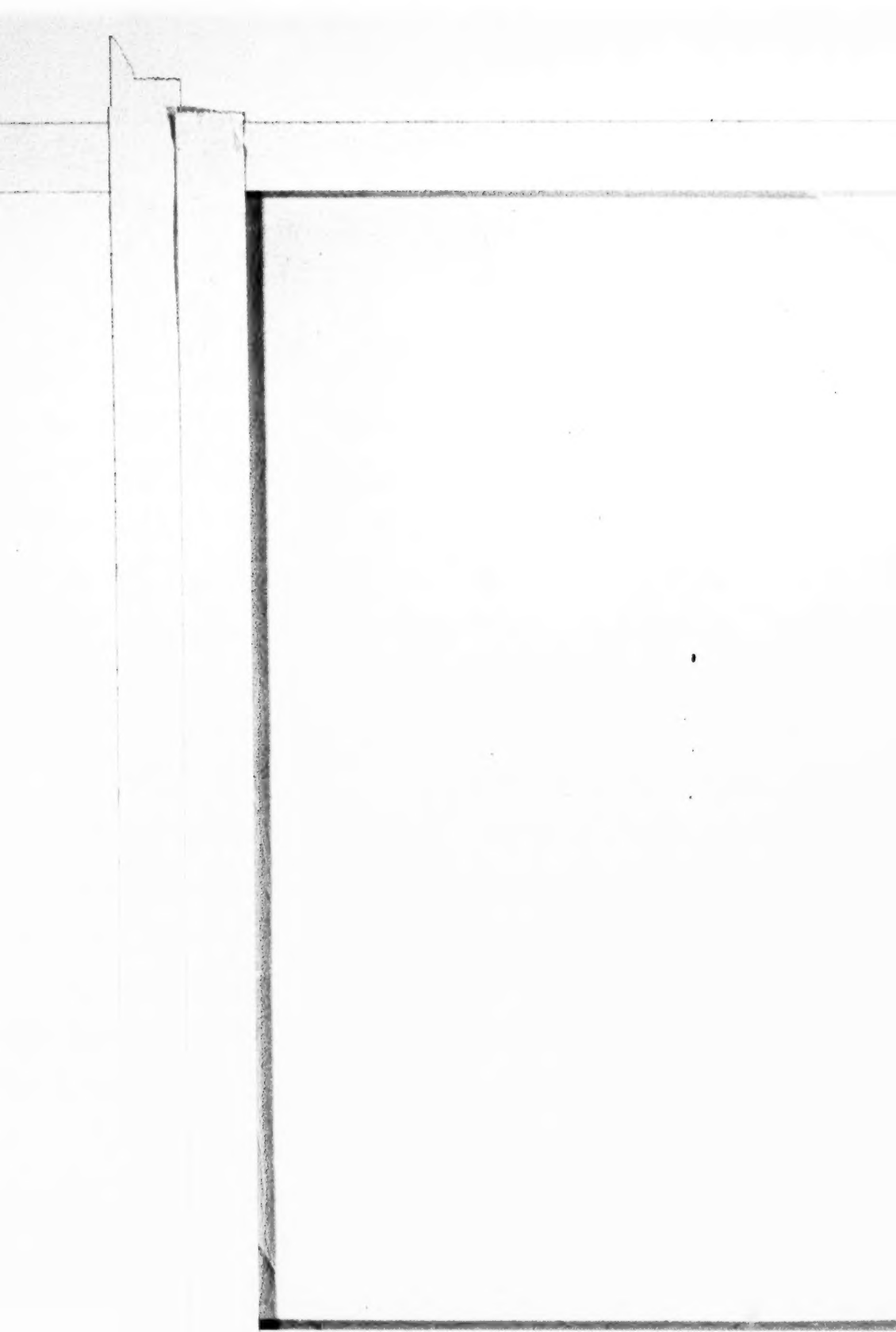
The issue here is whether or not Detective Millikin had a constitutionally acceptable level of competent evidence to establish probable cause for a warrantless arrest. The record shows that Detective Millikin did not have any personal knowledge of the reliability of the informant who originally stated that petitioner was carrying a concealed weapon, because he did not personally know the informant. The rationale underlying these conditions imposed on hearsay information from informants, especially that the arresting officer must have personal knowledge of the informant's reliability, is borne out in the instant case, as the informant's information here was not even correct, i.e., petitioner was not carrying a .44 magnum nor did he have on a shoulder holster (Tr-11).



THE AUTHORITIES RELIED UPON BY THE COURT OF APPEALS ARE NOT APPLICABLE TO THE CASE AT BAR.

The Court of Appeals for the Fourth Circuit relied mainly on four authorities in disposing of petitioner's contention: United States v. Bright, 471 F. 2d 723 (5th Cir. 1973); United States v. Weatherford, 471 F. 2d 47 (7th Cir. 1972); Orricer v. Erickson, 471 F. 2d 1204 (8th Cir. 1973); and United States v. Diamond, 471 F. 2d 771 (9th Cir. 1973).

Weatherford was based upon a deputy sheriff's own personal observations of the defendant purchasing ammunition, and he knew the defendant to be a convicted felon. The defendant's vehicle was put under surveillance and since the sheriff's department also had information that the defendant was going to cross a state border, it notified federal officials in order that they could set up a road block to intercept the defendant for violation of 18 U.S.C. § 922(6)(i). It is important to note that in the factual situation in Weatherford that crossing state lines was the essential element of the crime and that after this act was committed exigent circumstances came



..to play, precipitating the Carroll v. United States, supra, doctrine.

One then might be bound to say, as obviously the Court of Appeals reasoned in the instant case, that the similar factual situation and the attendant reasoning of Weatherford are very compelling to sustain the judgment of the District Court. However, the moving vehicle rule of Carroll did not dispense with the requirement of showing probable cause for the initial stopping of defendant as the officers did in the instant case.

In other words, even though the petitioner was traveling in a vehicle, the arresting officer must have had a reasonable belief based on sufficient probable cause that Jefferson was carrying on his person a concealed firearm.

The procedures in the instant case involve hearsay based on hearsay information which was relied upon by Detective Millikin and constitutes the sole basis upon which the issue of probable cause for the arrest of Jefferson is based.

If reviewing courts can sustain the government's position that probable cause based upon informant tips can be established

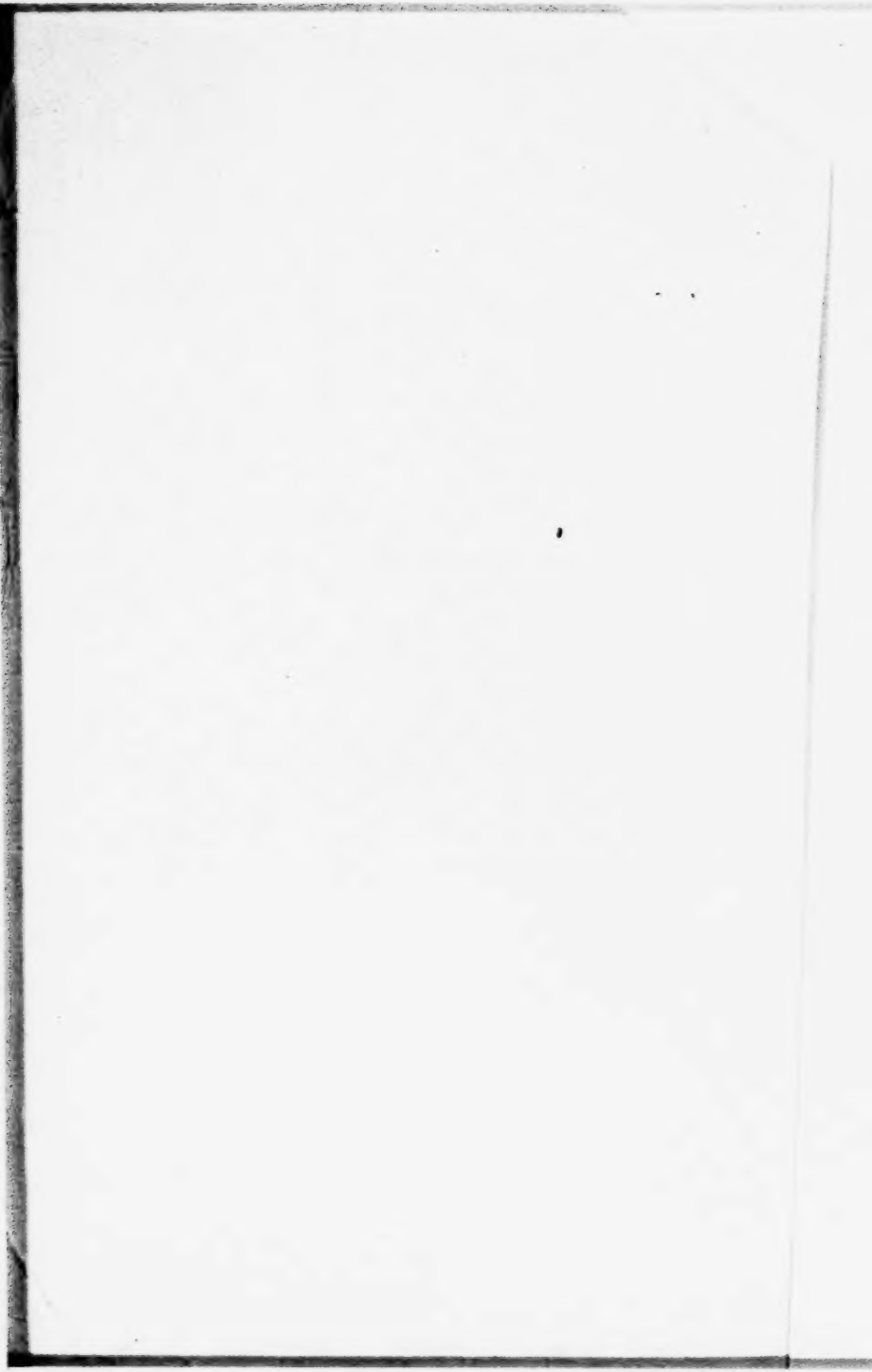
through hearsay twice removed (or more) then the reliability requirement can be extended reductio ad absurdum.

Of the remaining three cases relied upon by the Court of Appeals, only the Bright decision need be brought to the Court's attention. It is evident from the record of the instant case that Detective Millikin did not stop the petitioner on a routine check, even though he professed to have done so (Tr-8). Since this was not a routine check and because Detective Millikin neither had sufficient probable cause for stopping petitioner, Detective Millikin could not avail himself of the "plain view" doctrine. That this result must apply in the instant case is borne out in the Bright decision itself:

> Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions: Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed. 2d 576. One such exception to the warrant requirement is the so-called "plain view" doctrine, holding that evidence obtained in a warrantless seizure is admissible if inadvertently discovered by an officer rightfully in a position that afforded full view of the evidence. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971) (plurality opinion of Stewart, J.); Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 2d 1067 (1968); Kel v. California,

374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1967). Here as we have noted, Officer Foster was rightfully in a position to see the gun butt under the passenger seat, because he had probable cause to stop and approach appellant's car. 471 F. 2d at 725.

Finally, petitioner submits that the alleged probable cause in this warrantless seizure does not come within the exigent circumstances exceptions laid down in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971): The search-incident doctrine nor the hot pursuit doctrine is applicable to the instant case. However, the petitioner now contends that the United States Court of Appeals for the Fourth Circuit has seemed to have expanded the "exigent circumstances exceptions" put forth in Justice Stewart's plurality opinion so as to include hearsay on hearsay or hearsay twice removed information in derrogation of the Aguilar-Spinelli doctrines.

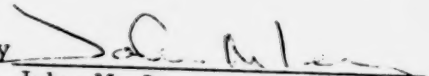


CONCLUSION

Petitioner therefore respectfully prays that for the foregoing reasons the Court grant this writ or summary to dismiss the judgment below.

Respectfully Submitted:

JOSEPH JEFFERSON, JR.

By 

John M. Levy
The Insurance Building
10 South 10th Street, Suite 613
Richmond, Virginia 23219
Counsel for Petitioner

PROOF OF SERVICE

I, John M. Levy, counsel for the Petitioner and a member of the bar of the Supreme Court of the United States, do hereby certify that, on the 27th day of July, 1973, I served a true copy of the foregoing petition for a writ of certiorari on the Respondent, United States of America, by mailing three copies of same, postage paid, to Dennis W. Dohnal, Assistant U. S. Attorney, 10th and Main Streets, Richmond, Virginia 23219.

JOHN M. LEVY
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-1195

THE UNITED STATES OF AMERICA, Appellee,

versus

JOSEPH JEFFERSON, JR., Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Albert V. Bryan, Jr., District Judge.

Before BOREMAN, Senior Circuit Judge, WINTER and CRAVEN, Circuit Judges

---

R. R. Ryder on brief for Appellant; Brian P. Gettings, United States Attorney, and Dennis Dohnal, Assistant United States Attorney, on brief for Appellee.

Submitted May 30, 1973 Decided June 27, 1973.

PER CURIAM:

Joseph Jefferson, Jr., a previously convicted felon, appeals from his conviction by the court, after waiver of jury trial, of possession of a firearm which had traveled in interstate commerce, in violation of 18 U.S.C. App. §1202(a). On appeal Jefferson contends that the district court erred in denying his motion to suppress evidence of the .32 caliber hand gun on which his conviction was based because the gun was allegedly seized in violation of his fourth amendment rights. We find this contention without merit and affirm the conviction.

At the October 30, 1972 hearing on Jefferson's motion to suppress, officer Powell of the Henrico County Police Department testified that at approximately 11:00 p.m. on August 14, 1972, he was told by a person, previously found to be a reliable informant, that Jefferson was carrying a concealed weapon in a shoulder holster. Powell conveyed this information to officer Millikin of the Richmond Police Bureau and later that night the two officers, upon observing Jefferson's moving vehicle, effected a stop by use of a warning siren and flashing red lights. Millikin testified that after both the police car and Jefferson's car had come to a stop he got out of the police car and approached Jefferson's car from the left; before he reached Jefferson's car Jefferson opened the driver's door with his left hand and simultaneously with his right hand

pulled a pistol from his waistline and placed it on the ash tray of the vehicle. After observing Jefferson lay the pistol on the ash tray Millikin placed Jefferson under arrest on a state charge of carrying a concealed weapon. The state charge was subsequently dismissed and this federal prosecution followed.

At the time the two officers stopped Jefferson their avowed purpose was not to make an arrest but to question him concerning the tip Powell had received. The Supreme Court recognized in Terry v. Ohio, 392 U.S. 1 (1968), that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." 392 U.S. at 22. See Adams v. Williams, 407 U.S. 143 (1972); Stone v. Patterson, 468 F. 2d 558 (10th Cir. 1972); United States v. Brumley, 466 F. 2d 911 (10th Cir. 1972); United States v. Harflinger, 436 F. 2d 928 (8th Cir. 1970), cert. denied, 402 U.S. 973 (1971).

The investigatory stop executed in the present case constituted a seizure of Jefferson's person, United States v. Jackson, 448 F. 2d 963 (9th Cir. 1971), and to be valid must have satisfied the reasonableness requirement of the fourth amendment. Terry v. Ohio, supra. In Terry the Supreme Court enunciated a standard for evaluating the reasonableness of a police officer's action in effecting a personal seizure which falls short of an arrest, that is, "[W]ould the facts available

to the officer at the moment of the seizure ... warrant a man of reasonable caution in the belief that the action taken was appropriate?" 392 U.S. at 21-22.

Applying this standard in the present case we conclude that the information supplied by an informant whose tips had been found by Powell to have been reliable in previous cases was sufficient to justify the officers' subsequent investigatory stop of Jefferson's vehicle.

Having first concluded that the stopping of Jefferson's car was lawful, we hold that officer Millikin's observation, from outside of Jefferson's car, of Jefferson removing a pistol from his person and placing it in the ash tray justified seizure of the gun under the plain view doctrine, since the object was in the plain view of Millikin who was rightfully in position to have that view. Harris v. United States, 390 U.S. 234 (1968); United States v. Gulledge, 469 F. 2d 713 (5th Cir. 1972). Therefore, the motion to suppress was properly denied and the admission of the gun into evidence was not error.

The contention raised by appellant has been considered in remarkably similar cases in the Fifth, Seventh, Eighth and Ninth Circuits. United States v. Bright, 471 F. 2d 723 (5th Cir. 1973); United States v. Weatherford, 471 F. 2d 47 (7th Cir. 1972); Orricer v. Erickson, 471 F. 2d 1204 (8th Cir.

1973); United States v. Diamond, 471 F. 2d 771 (9th Cir. 1973). The disposition of this case is in accord with the decisions in those cases.

Accordingly, we dispense with oral argument and affirm the judgment of conviction.

AFFIRMED.

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JOSEPH JEFFERSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that there was no probable cause to stop his moving vehicle.

After a non-jury trial in the United States District Court for the Eastern District of Virginia, petitioner, a previously convicted felon, was convicted of possessing a firearm which had travelled in interstate commerce, in violation of 18 U.S.C. App. 1202(a). He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App.).

At approximately 11:30 p.m. on August 14, 1972, Officer Aubrey S. Powell of the Henrico County Police Department was told by a person, previously found to be a reliable informant, that petitioner was carrying a concealed weapon (Tr. 5, 13-14, 18).[1] Since Powell's

[1] "Tr." designates the transcript of the trial, a copy of which is being lodged with the Clerk of this Court.

authority did not extend to the city of Richmond, where petitioner had been seen, Powell conveyed this information to Detective J. D. Millikin of the Richmond, Virginia Police Bureau (Tr. 5, 7-8, 10-11). At 3:00 a.m. on August 15, 1972, Millikin and Powell, upon observing petitioner operating an automobile, stopped petitioner (Tr. 6). Millikin testified that, as he approached the stopped vehicle, he observed petitioner remove a pistol from his waistline and lay it on the ashtray of the vehicle (Tr. 6, 9). Petitioner was thereupon placed under arrest for the state offense of carrying a concealed weapon (Tr. 3, 7).[2]

It was stipulated that the weapon in question had been shipped in interstate commerce on or about January 6, 1972, and that petitioner had been previously convicted of a felony (Tr. 44-46).

Petitioner contends that there was insufficient probable cause to make an investigatory stop of his car and that any evidence seized as a result of such a stop should be suppressed. This contention was properly rejected by the court of appeals, on whose opinion we rely.[3]

Petitioner raises one argument not considered by the court below—that reliable hearsay communicated to one police officer may not form the basis of a stop by another officer. This contention has been rejected. See *United States* v. *Melancon*, 462 F. 2d 82, 91 (C.A. 5), certiorari denied, 409 U.S. 1038; *United States* v. *Plemmons*, 336 F. 2d 731, 734 (C.A. 6).

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[2] Since petitioner was prosecuted on the federal charge, the state charge was dismissed.

[3] We additionally note that at the trial petitioner's counsel specifically stated that he did not question the reliability of the informant. (Tr. 14, 16).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.